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May 5, 2017

Ms. Lisa J. Stevenson
Acting General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

**Re: Response to March 20, 2017 Letter and Request for Pre-
Probable Cause Conciliation — MUR 7221 (Karen Hughes)**

Dear Ms. Stevenson:

We write on behalf of our client Karen Hughes in response to the Commission's letter dated March 20, 2017. Because Ms. Hughes did not knowingly and willfully violate the Federal Election Campaign Act ("FECA" or "the Act"), the Commission should not find probable cause to believe that she committed a knowing and willful violation. Rather, with respect to the lesser allegation that Ms. Hughes violated 52 U.S.C. § 30122 (but did not do so knowingly and willfully), the facts weigh heavily in favor of a measured and rapid resolution, and Ms. Hughes therefore requests pre-probable cause conciliation.

I. Factual Background

Karen Hughes is a recently retired bookkeeper and human resources specialist, not a sophisticated political actor. She has never attended a campaign rally, never held a government position, never volunteered on a political campaign, and never run for political office. Until 2010, when directed to do so by her long-time boss, James Laurita, Jr., she had never attended a political fundraiser or donated to a campaign. Ms. Hughes — who has a high school diploma, but no college degree — is not a lawyer and has never received training regarding campaign finance laws. She has never read FEC reports or guidance or reviewed FECA or its implementing regulations. Indeed, before this matter, she was not even familiar with the FEC. During her decades of employment prior to her retirement, she tended to concentrate on her work with little interest in politics.

Ms. Hughes first became acquainted with the Laurita family in 1974, shortly after she graduated from high school. James Laurita, Sr. offered her a job working in accounts payable

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and payroll at his family-owned companies. She later assumed human resources duties and assisted with basic accounting. In 2000, upon Laurita, Sr.'s retirement, she joined Mepco, a West Virginia-based coal mining company run by Mr. Laurita's son, James Laurita, Jr., whom she had known since he was a child. Initially, her role involved assisting with the company's human resource functions. Over time, she came to be involved in other administrative areas of the company but never had a meaningful leadership or policy-making role. She supervised two relatively junior accounts-payable clerks and the company's information technology specialist. Her duties involved managing payroll, tracking receivables, helping resolve information technology issues, and playing a "utility" role, picking up other administrative work.

In 2007, Mr. Laurita, Jr. formalized the company's management structure and named corporate officers. He rewarded Ms. Hughes for her loyalty to the company with a substantial pay raise and a new title, "Secretary and Treasurer." He elevated several other employees to officerships at that time as well. But despite the new title and "officer" status, Ms. Hughes was an officer-in-name-only. Her ministerial role was largely unchanged, other than increased administrative responsibilities for payments, billing, and collections. She continued to have only three direct reports and she did not make decisions or advise the company on budgeting, project finance, new mines, hiring, or business strategy. Mepco's CFO handled policy decisions related to the company's finances, and the corporate secretary of Mepco's parent company fulfilled that role for Mepco. Consequently, Ms. Hughes did not handle any of the duties typical to Corporate Secretaries and Corporate Treasurers. She did not manage board meeting logistics; attend board meetings and keep minutes; "facilitate board communications; [a]dvice the Board on its roles and responsibilities; [f]acilitate the orientation of new Directors and assist in Director training and development; [m]aintain key corporate documents and records;" exercise responsibility for state corporation laws; "[o]versee Stockholder Relations . . . ; [m]anage process[es] pertaining to the annual shareholder meeting;" advise the company regarding "[s]ubsidiary management and governance; [m]onitor corporate governance developments . . . ; serve as a focal point for investor communication and engagement on corporate governance issues," or address issues such as risk, interest rates, or foreign currencies.¹

¹ See Soc'y for Corporate Governance, "What is a Corporate Secretary?," <https://www.societycorp.gov/about/roleofsecretary>, accessed Apr. 25, 2017 (corporate secretary duties); Bloomberg Professional, "The Evolution of the Corporate Treasurer," July 29, 2016, available at <https://www.bloomberg.com/professional/blog/evolution-corporate-treasurer> (corporate treasurer duties).

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A few years after the promotion, on March 4, 2010, Ms. Hughes and other Mepco officers received an email from Mr. Laurita, Jr., the CEO. He wrote, "I'd like to have a meeting tomorrow @ 11:30 am in the conference room. It is in regard to the elections, and our support for particular candidates." MEPCO_00000070. During the meeting, Ms. Hughes recalls that Mr. Laurita complained about a political environment he perceived as hostile to the coal industry and instructed the group that Mepco would be starting a new program. As part of the program, Mepco's officers were to make political contributions to candidates supportive of the coal industry, as selected by Mr. Laurita, and Mepco would reimburse the officers for those contributions.

Shortly after the meeting, Mr. Laurita asked Ms. Hughes to come to his office. Ms. Hughes recalls this visit because it was unusual for her to meet with Mr. Laurita in his office, even though their offices were nearby. Mr. Laurita tasked Ms. Hughes with assisting with the clerical aspects of the contribution reimbursement program and emphasized two things.

First, he instructed Ms. Hughes not to discuss the reimbursement program with anyone in the company other than the participating officers. At the time, the company was under financial stress as it prepared for the opening of a power plant to be exclusively supplied by Mepco. As a result of these financial strains, Mepco was undergoing significant cost-cutting measures. Ms. Hughes therefore assumed that Mr. Laurita wanted to keep information about the program controlled because employees would be disturbed if they knew the company was spending money on political contributions while denying other expense requests. *Second*, Mr. Laurita told Ms. Hughes to "ask" the executives for contributions, not "tell" them. Ms. Hughes did not know the reason for that request, but it would have been reasonable for her to assume that it had something to do with ensuring that the contribution program was legally compliant.

Following the meeting, Ms. Hughes did as she was instructed by the CEO. She had no reason to question—and never did question—the legality of the program. Without any background in politics or campaign finance law, it did not cross her mind that the program Mr. Laurita had instructed her to join might be unlawful. She trusted Mr. Laurita and the company's lawyer to ensure that all company programs complied with the relevant laws and regulations. Indeed, Ms. Hughes viewed Mr. Laurita as a CEO who emphasized the need for the company to follow rules and regulations. She recalls, for example, Mr. Laurita emphasizing the need to comply with environmental and permitting requirements. She did not view him as an executive prone to cutting corners.

Ms. Hughes therefore implemented Mr. Laurita's instructions. When Mr. Laurita wanted the officers to contribute to a candidate, he would tell Ms. Hughes the candidate,

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amount, and who to ask for contributions, including whether to ask the officer's spouse. *See, e.g.*, MEPCO_00000001. This information all came from Mr. Laurita; Ms. Hughes did not, on her own initiative, make decisions about which candidates she or others would support, the amounts of requested contributions, or which officers should be asked to make contributions. Based on Mr. Laurita's requests, she would prepare messages to the employees requesting the contributions, with an expected return date, again dictated by Mr. Laurita. *See, e.g.*, MEPCO_00003696. At Mr. Laurita's instruction, she then asked payroll to distribute bonuses to account for those contributions, and to gross up the amounts to account for taxes. She felt that participating in and administering the program was expected of her as an employee, like the many other administrative tasks she was assigned.

Throughout the reimbursement program, Ms. Hughes did not have cause to question the program's legality. She was copied on emails with company lawyers that discussed the reimbursement program, and those lawyers did not object to the program. On December 19, 2012, for example, Mepco General Counsel Carrie Lilly emailed Mr. Laurita, copying Ms. Hughes, "Jim, Did you make any decisions about reimbursement of your political contributions that I should include in the cash flow forecast?" MEPCO_00007803. The same day, Mr. Laurita emailed Jeff Keffer, the chief legal officer of Mepco's parent company, along with Ms. Lilly, Ms. Hughes, and James Grady of consulting firm Alvarez and Marsal, "I haven't taken a look at my employment agreement for years since they never really honored it (no raises until last year, no bonuses, no political reimbursement)." MEPCO_00007877. Ms. Hughes is not aware of either attorney raising a concern about these statements. *See id.* Given the failure of both attorneys to raise concerns when the CEO described reimbursed political contributions, it was natural for Ms. Hughes—who had no legal education or campaign finance background—to continue to follow her employer's instructions and assume that Mepco was complying with the relevant regulations.

On September 26, 2013, lawyers from the law firm Kirkland & Ellis, which represented Mepco in connection with its bankruptcy proceeding, learned of the reimbursement payments. *See* MUR 7221 (Hughes) Submission of Mepco Holdings, LLC and Longview Intermediate Holdings C, LLC at 2 (Nov. 17, 2013). After this discovery, Kirkland & Ellis attorneys asked to meet with Ms. Hughes. There she learned, for the first time, that it is unlawful to accept reimbursements for personal political contributions. She was surprised and felt betrayed by Mr. Laurita. Shortly thereafter, she made a *sua sponte* filing with the Commission explaining her role in Mr. Laurita's political contribution program, and has continued to cooperate throughout the Commission's investigation of this matter. *See* MUR 7221 (Hughes) Sua Sponte Submission (Jan. 29, 2014).

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In 2015, Ms. Hughes retired from Mepco. She is not currently employed.

II. Analysis

Because Ms. Hughes did not know that federal law prohibits reimbursing contributions, or that participation in Mr. Laurita's political contribution reimbursement program was otherwise unlawful, the Commission should not find probable cause to believe that she willfully violated the Act. Rather, pre-probable cause conciliation as to the allegations of non-knowing and willful violations of section 30122 is appropriate.

A. The Commission Should Not Find Probable Cause to Believe that Ms. Hughes Knowingly and Willfully Violated Section 30122

Federal law makes it unlawful for a person to "make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution." 52 U.S.C. § 30122. "Knowing and willful" violations of this provision are subject to potentially crippling penalties of between 300 percent and 1000 percent of the amount involved in the violation. 52 U.S.C. § 30109(a)(6)(C). Because these penalties can be extreme, establishing a "knowing and willful" violation is an extremely high standard, one the facts here demonstrate that Ms. Hughes does not satisfy. Indeed, in light of the high burden of proof, in at least the last two decades, the Commission has never assessed "knowing and willful" penalties against an individual whose sole involvement was, like Ms. Hughes, making the contributions she was directed to make, performing the mechanical functions of preparing and distributing the solicitation material, and authorizing reimbursements at the direction of her boss.

1. Ms. Hughes Did Not Consciously and Deliberately Defy FECA

The U.S. Court of Appeals for the District of Columbia Circuit is the only federal appellate court to have directly defined "willful" under FECA. In *AFL-CIO v. FEC*, the court held that willfulness must "be equivalent to a knowing, conscious, and deliberate flaunting of the Act." *AFL-CIO v. FEC*, 628 F.2d 97, 101 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 982 (1980) (internal quotation omitted). The D.C. Circuit upheld this definition in *National Right to Work Committee, Inc. v. FEC*, 716 F.2d 1401 (D.C. Cir. 1983). This definition of willfulness, which demands "defiance" or "deliberate flaunting" of the Act, *see AFL-CIO*, 628 F.2d at 101, requires

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both a knowledge that the contribution in the name of another provision exists and a conscious decision to defy it.²

Given the lack of other appellate precedent, and the special experience of the D.C. Circuit in interpreting FECA, it comes as no surprise that both the Commission and the Department of Justice have adopted the *AFL-CIO* standard when interpreting the Act. See, e.g., MUR 5927 (Solomon), First Gen. Counsel's Rpt. at 5 (Dec. 13, 2007); MUR 6488 (Lund), First Gen. Counsel's Rpt. at 12 (June 6, 2012); MUR 6485 (W Spann) First Gen. Counsel's Rpt. at 13 (Aug. 28, 2012). The Department of Justice's manual on prosecuting FECA violations specifically adopts the *AFL-CIO* definition of willfulness. See U.S. Department of Justice, Federal Prosecution of Election Offenses at 135 (7th ed., May 2007) (willfulness in FECA requires a "specific criminal intent," requiring proof not only that the "offender was aware of what the law required," but also "that the offender acted in conscious disregard of a known statutory duty or prohibition") (emphasis added).

Indeed, FECA's own legislative history demonstrates that a "willful" violation must involve a deliberate defiance of a known specific statutory duty. The Report of the Committee on House Administration on FECA's 1976 amendments described the willful standard as "distinguish[ing] between violations of the law as to which there is not a *specific* wrongful intent" and "violations as to which the Commission has clear and convincing proof that the actions were committed with a knowledge of all the relevant facts and a recognition that the action is prohibited by law." H. Rep. 94-917 at 3-4 (emphasis added). The floor debate similarly required a "specific wrongful intent." 122 Cong. Rec. 12,196, 12,199 (May 3, 1976) (Remarks of Rep. Hays). A "*specific* wrongful intent" implies more than a "*general* wrongful intent"; it requires knowledge a specific statutory requirement and deliberate disregard of that duty.

Ms. Hughes did not have such a specific wrongful intent here. She did not consciously and deliberately choose to "deny" FECA. See *AFL-CIO*, 628 F.2d at 101. She was not even

² The Office of General Counsel's Factual and Legal Analysis states that willfulness merely requires an awareness that the proscribed conduct is unlawful, citing *United States v. Danielczyk*, 788 F. Supp. 2d 472, 487-91 (E.D. Va. 2011). But no federal appeals court has adopted this standard and only one district court has followed it. See *United States v. Whittemore*, 944 F. Supp. 2d 1003, 1006 (D. Nev. 2013). Moreover, the *Danielczyk* court failed to consider the *AFL-CIO* standard. See *Danielczyk*, 788 F. Supp. 2d at 487-91 (at trial), and *United States v. Danielczyk*, 917 F. Supp. 2d 573, 580 (E.D. Va. 2013) (on remand). But even if the lesser standard in *Danielczyk* does apply, any violations by Ms. Hughes would still not be willful. Even the *Danielczyk* standard requires knowledge that the conduct was unlawful and Ms. Hughes, as described in section II.A.3 below, had no such knowledge.

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familiar with FECA, let alone FECA's prohibition on contributions in the name of another. As noted above, despite her officer title, she was a bookkeeper and human resources specialist who had never attended a campaign rally, never attended a political fundraiser, and never donated to a campaign. She had not received campaign finance law training, was not aware of FECA's complex and technical requirements, and indeed does not even recall knowing the FEC existed before this matter.

2. The Factors the Commission Traditionally Relies On To Impose Willfulness Penalties Are Not Present

Because courts have adopted a high threshold for establishing willfulness, the Commission has focused on pursuing knowing and willful penalties against the masterminds behind political contribution reimbursement schemes, not against individuals the ringleaders direct to make reimbursed contributions or to perform ministerial tasks in furtherance of the program. Indeed, in the dozens of reimbursement cases the Commission has handled in at least the past two decades, the Commission has never assessed the crippling willful penalties against employee-conduits whose sole activity was to complete the administrative tasks assigned by their superiors. Rather, in assessing whether to seek willfulness penalties the Commission looks to the following factors, none of which are present here.

Ms. Hughes was a conduit, not the mastermind. The Commission focuses its enforcement in "contribution in the name of another" cases on initiators of contribution reimbursement schemes. *See, e.g.*, MUR 6215 (Tate Snyder Kimsey Architects, Ltd.) First Gen. Counsel's Rpt. 14-16 (May 12, 2010) (recommending conciliation for ringleader but no penalty for other participants); MUR 6143 (Galen Capital Corp.) First Gen. Counsel's Rpt. at 1-4 (June 23, 2008), Danielczyk Conciliation Agreement (July 15, 2013) (knowing and willful conciliation with ringleader, but not penalizing over thirty conduits). As a result, the Commission "frequently does not pursue conduits." MUR 5871 (Noe) Gen. Counsel's Rpt. #4 at 2 (May 5, 2008).

This is especially true when the conduit was directed to participate by an employer. The "usual practice" is not to pursue "subordinate employees" in these cases. MUR 6465 (Fiesta Bowl) First Gen. Counsel's Rpt. at 21 (Nov. 21, 2011). This is so because, in the context of an employment relationship, conduits often feel they have little choice but to participate in the program, for fear that they might be disadvantaged in their employment or potentially even lose their livelihood. *See* MUR 5927 (Solomon) First Gen. Counsel's Rpt. at 7 (Dec. 13, 2007) (recommending no further action against employees because as "subordinates, their contributions may not have been entirely voluntary") (citing MUR 5871 (Noe)); MUR 5758

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(O'Donnell) Gen. Counsel's Rpt. #1 at 13 (Feb. 15, 2007), Notification to Dolores Valdez (Dec. 7, 2012) (closing file without apparent action against secretary who "did not perceive that she had a choice" but to participate); cf. MUR 4583 (Embassy of India and D. Singh) First Gen. Counsel's Rpt. at 18 (Nov. 6, 1996) (Commission has chosen not to pursue conduits who "contributed out of a sense of obligation because, for example, they were employees of the main actor.").

Indeed, the Commission has even refused to pursue willfulness penalties against mere conduits where they knew that participation in the scheme was illegal or improper. See MUR 5453 (Giordano for United States Senate) Willsey Conciliation Agreement (Oct. 12, 2005) (company president approached by another officer about reimbursement was advised by counsel it was illegal and entered into non-willful conciliation agreement). Here, there is no contention that Ms. Hughes was the ringleader or initiator of this contribution reimbursement program. Mr. Laurita initiated the program and controlled it at every step.

Ms. Hughes was a subordinate employee following instructions. On those occasions where conduits are named as respondents, the Office of General Counsel has routinely recommended, and the Commission has routinely approved, taking no disciplinary action against those directed to take part in the program by their superiors. See MUR 5955 (Valdez) First Gen. Counsel's Rpt. at 9 (June 11, 2008); MUR 4871 (Broadcast Music) Gen. Counsel's Rpt. #3 at 8 (Aug. 3, 2000) (recommending no action against employee who assisted boss with scheme, in part because her "participation in the reimbursement scheme was limited to following her supervisor's instructions"); MUR 5849 (Bank of America) (taking no disciplinary action against employees who acted at the direction of their employer); MUR 5927 (Solomon) First Gen. Counsel's Rpt. at 7 (Dec. 13, 2007) (recommending no further action against employees, including one who stated, "I did what I was asked to do by my boss," because as "subordinates, their contributions may not have been entirely voluntary"); MUR 5041 (Wuesthoff Memorial Hospital) Gen. Counsel's Rpt. #3 at 21 (Nov. 30, 2000) (recommending no action against conduit subordinates "because their participation in the reimbursement scheme was limited to following their supervisor's instructions"); MUR 6143 (Galen Capital Corp.) Notification to April Spittle (July 15, 2013) (taking no action against secretary who extended invitations, collected contributions and donor cards, and assisted in distributing the reimbursements, or against conduits who made reimbursed contributions); MUR 6215 (Tate Snyder Kimsey Architects, Ltd.) First Gen. Counsel's Rept. (May 12, 2010) (recommending

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dismissal where executive assistant allegedly aided violation of FECA, because she was low-level employee acting at the direction of a superior).³

Like the above participants in reimbursement programs against whom the Commission has assessed no penalties, Ms. Hughes was a subordinate employee carrying out the instructions of her superior. She did not choose the candidates that conduits were to support; she did not select the amount of the requested contributions; she did not decide who would make these contributions. She did not recruit individuals to the program. All of these decisions were made by Mr. Laurita. Ms. Hughes had worked for and trusted the Laurita family for her entire adult life, and owed her livelihood to maintaining that relationship with Mr. Laurita. Absent any knowledge of the legal issues related to contributions in the name of another, it would not have made sense for Ms. Hughes to refuse to carry out the instructions from the CEO.

³ In a small handful of cases, company employees subordinate to the ringleader have reached conciliations in which they agreed they committed willful violations. But these few cases are not the typical employee-conduit arrangement where the subordinate mechanically follows the superior's instructions. In four cases, the individual was not merely carrying out instructions but exercising substantial discretion with respect to which candidates to support, making contributions on their own initiative without any direction, and/or recruiting others to make reimbursed contributions. See MUR 4818 (Roberts for Congress) Spears Resp. at 1 (Dec. 15, 1999), Spears Conciliation Agreement (Mar. 19, 2004) (individual made decisions on her own about which candidates should be supported, when to make contributions, and who should make reimbursed contributions); MUR 5027 (Nichols & Cervantes) Cervantes Conciliation Agreement (Sept. 5, 2000) (employee recruited "family members to make contributions" that would be reimbursed); MUR 5398 (Lifecare Management Services) First Gen. Counsel's Rpt. at 2-3 (Dec. 16, 2003) (CEO "had an agreement" with vice president to increase vice president's salary to cover contributions and vice president "encouraged at least one [company] executive to make certain political contributions" that would be reimbursed); MUR 5666 (MZM) Gen. Counsel's Rpt. #2 at 3 (July 5, 2007) (head of regional office "recruit[ed]" other employees to be conduits and distributed cash to them as reimbursement); MUR 5871 (Noe) Restivo Conciliation Agreement (Sept. 15, 2008) (respondent was "super-conduit" who accepted funds from ringleader to reimburse himself and "recruited" two other conduits). In another case, there was no question that the individuals knew what they were doing was illegal or improper and, even there, the individual conduits did not pay any fines. See MUR 4884 (Future Tech International) Complaint at 54-56, (Jan. 5, 1999) (company counsel told respondent the reimbursements were illegal); MUR 4818 (Roberts for Congress) Spears Conciliation Agreement (Mar. 19, 2004) (individual admitted knowledge of impropriety). And in the remaining case in which a subordinate reached a conciliation agreement involving a knowing and willful admission, the company's Chief Operations Officer and "second-in-command" changed her story on multiple occasions, solicited employees for contributions, asked for money to deposit to her own account to use for reimbursing others, and helped to mislead an internal investigation into the matter. MUR 6465 (Fiesta Bowl) Third Gen. Counsel's Rpt. at 6 (Feb. 3, 2015), Complaint at 64, 99-101 (Apr. 5, 2011), Second Gen. Counsel's Rpt. at 13 (July 18, 2012).

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Ms. Hughes had no political sophistication and was an officer-in-name-only. The Commission is especially cautious about assessing willful penalties against employees who lack senior leadership roles, are officers "in name only," or who are not politically sophisticated. For example, in MUR 6143 (Galen Capital Corp.) Gen. Counsel's Rpt. #2 at 9 (Feb. 22, 2010), Notification to April Spittle (July 15, 2013), the Commission took no action against the company's secretary, who carried out her activity at the direction of the company's CEO, and who believed her employer when he told her that reimbursements were legal and routine. Similarly, in MUR 5666 (MZM), MZM's corporate officers were alleged to have approved making corporate contributions, and most also were alleged to have been used as conduits. MUR 5666 (MZM) Gen. Counsel's Rpt. #2 at 15-16 (July 5, 2007). But OGC's investigation found that these individuals were officers "in name only," with the CEO exercising "sole financial control" over the company. *Id.* at 16, 16 n.13. They were not "sophisticated political actors[,] and did not have a history of making political contributions." *Id.* at 17. As a result, the Commission voted to take no action as to these officers. *See id.* Certification (Oct. 24, 2007).

As with the above respondents and as described above, Ms. Hughes was not a sophisticated political actor. She was totally unfamiliar with political fundraising and campaign finance and had not made political contributions before this program. *See* MUR 5666 (MZM) Gen. Counsel's Rpt. #2 at 17 and Certification (citing lack of "political sophistication" and absence of "history of making political contributions" as evidence that a respondent did not act willfully, even when the respondent is a corporate officer). Moreover, Ms. Hughes was not the typical Corporate Secretary and Treasurer. She had no college degree. Her job duties were primarily administrative and did not change after her promotion to "officer" status. She managed payroll, tracked receivables, and helped resolve IT issues. But she did not make decisions or advise the company on budgeting, project finance, new mines, hiring, or business strategy. Like the officers in MUR 5666, she was an officer in name only.

The contribution program appeared to have the assent of counsel. The Commission has also agreed to conciliations admitting to non-willful violations when the activity has or appears to have approval, or at least assent, of counsel. *See* MUR 5453 (Giordano for United States Senate) Wittman Conciliation Agreement at 3 (Nov. 16, 2005) (approving non-willful conciliation where employer soliciting contribution told contributor that outside counsel had approved the program). Indeed, involving counsel in a decision about a reimbursement is "plainly inconsistent with willful intent." MUR 6485 (W Spann) First Gen. Counsel's Rpt. at 13 (Aug. 28, 2012).

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The Commission's approach to Dolores Valdez is illustrative. In MUR 5758 (O'Donnell), Ms. Valdez was the secretary to Pierce O'Donnell. O'Donnell agreed to host a fundraiser for a candidate, who sent him written instructions prohibiting reimbursed contributions and donors cards indicating the same. MUR 5758 (O'Donnell) Notification with Gen. Counsel's Brief to Dolores Valdez at 2-3 (Oct. 26, 2006). O'Donnell asked Ms. Valdez to solicit contributions from his law firm's employees, to tell non-lawyer employees they could be reimbursed, and to arrange logistics for a fundraiser. *Id.* Ms. Valdez did as Mr. O'Donnell asked even though the instructions to focus only on non-lawyers could have given her cause to question the program's legality. *Id.* at 4. Recommending probable cause to believe that Ms. Valdez committed a non-willful violation, OGC explained that Ms. Valdez had a high school education, was hired and employed at the will of O'Donnell, and perceived she had no choice but to obey his request. *Id.* Gen. Counsel's Rpt. #1 at 13 (Feb. 15, 2007). It determined she may have acted in reliance on O'Donnell's legal education. *Id.* OGC concluded, "while Valdez may have more responsibility than other conduits, she was ultimately acting on the orders of her employer." *Id.* The file was closed, apparently without action as to Ms. Valdez.

Similarly, in this case, Ms. Hughes's receipt of communications with counsel about the reimbursements show she lacked the knowledge required for a finding of willfulness. Ms. Hughes was copied on two emails with attorneys that discussed reimbursing political contributions. See MEPCO_00007803; MEPCO_00007877. Neither of the attorneys expressed any concern about the program in those emails. Like Ms. Valdez in MUR 5758 (O'Donnell), she was asked by her boss to administer part of the contribution project, had a high school education, trusted the legal education and political expertise of others, and felt that participation was part of her at-will employment.

3. The Documents Cited in the Reason to Believe Finding Do Not Show Willfulness.

The Commission's letter of March 20, 2017 points to three types of documents that formed the basis for the Commission's "reason to believe" finding. But a closer examination of each shows that none come close to showing that Ms. Hughes was aware of the restrictions in 30122 or deliberately chose to defy them.

The Receipt of Donor Cards Does Not Show Willfulness. The Commission points to Ms. Hughes' receipt of two political contribution forms that contained the following or similar language in fine print: "Contributions must be made from your own funds, and funds cannot be provided to you by another person or entity for the purpose of making this contribution." See MUR 7221 (Hughes) Factual and Legal Analysis at 10, 10 n.53 (quoting

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MEPCO_00000121). But Ms. Hughes did not read the disclaimer; it was her practice to simply forward the information to its intended recipient as she was instructed. Moreover, receipt of these donor cards does not show that she acted willfully. The Commission has repeatedly allowed respondents to agree to non-willful violations in conciliation, or has taken no action at all, where the donors *signed* a donor card that included the prohibition on reimbursed contributions. See MUR 6143 (Galen Capital Corp.) First Gen. Counsel's Rpt. at 10 (June 20, 2008); cf. MUR 5871 (Noe) First Gen. Counsel's Rpt. at 7 (Oct. 24, 2006) and Certification (Aug. 19, 2008) (conduits who filled out donors cards prohibiting reimbursed contributions admonished, but no further action taken). Even if Ms. Hughes had read the disclaimers on the bottoms of the material she was forwarding, it is unlikely that she would have questioned the legality of the program. Given her clerical role, she was not in the habit of questioning the judgment of the company's attorneys or Mr. Laurita.

A Single Email About Corporate Political Activity Does Not Show Willfulness. The Commission next points to an email Ms. Hughes sent to Mepco employee Ron Clark on June 4, 2010 in which she wrote, "Companies cannot donate to anything political, only individuals." MUR 7221 (Hughes) Factual and Legal Analysis at 10 (quoting MEPCO_00004005). But this is not indicative of any knowledge of the contribution in the name of another provision. Ms. Hughes believes that she was simply passing on a statement she must have heard from Mr. Laurita or someone else at Mepco. The context for the email did not involve the political contribution reimbursement program and there is no indication that awareness of restrictions on corporate political activity in this context would have led her to question the reimbursement program, which the company's own lawyer later failed to correct. An individual inexperienced with campaign finance law could reasonably conclude (incorrectly) that while corporations cannot make direct contributions, executives can set up reimbursement programs so that individual employees can make contributions.⁴

Ms. Hughes' requests that two emails be deleted were unrelated to any concerns about the legality of the reimbursement program. Ms. Hughes' two requests that employees delete an email does not indicate willfulness. As described above, Mr. Laurita had instructed Ms. Hughes not to discuss the contribution program with anyone other

⁴ In any case, Ms. Hughes's statement shows how little she understood about campaign finance law. Corporations can engage in political activities. Mepco itself, an LLC taxed as a partnership, could make contributions in federal elections. And, of course, corporations may make independent expenditures; contribute to Super PACs; and establish, administer, and solicit contributions for a corporate PAC.

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than the officers. She believed that Mr. Laurita was concerned about internal company dissatisfaction with his decision to reimburse contributions when other requests for corporate funds were being denied and therefore followed Mr. Laurita's instructions by asking the officers to take steps to ensure that other employees did not become aware of the political spending. Some officers worked out of offices that were like "freeways," Ms. Hughes recalls, with many individuals coming and in and out throughout the day. Had Ms. Hughes wished to conceal the program because she feared it was illegal, she would have been more consistent with her concealment. Instead, she frequently sent emails about the contribution reimbursements without instructing that they be deleted.⁵

Moreover, even if Ms. Hughes knew the reimbursements were unlawful—which she did not—the Commission still does not generally pursue willful penalties against subordinate employees who were aware of the restrictions. *See, e.g.*, MUR 5453 (Giordano for United States Senate) Willsey Conciliation Agreement (Oct. 12, 2005). In the absence of any history of penalties in a similar case, and many cases where there were no such penalties assessed, any probable cause finding and attempted willful penalties would raise serious due process concerns. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317, No. 10-1293 (2012) (due process, especially in First Amendment context, requires that regulated entities know what the law requires and "precision and guidance" so that enforcers "do not act in an arbitrary or discriminatory way") (citations omitted).

B. Ms. Hughes Qualifies for the Benefits of the Commission's *Sua Sponte* Policy, Which Counsels Strongly Against a Willfulness Finding Here.

The Commission's *sua sponte* policy counsels against a willfulness finding. To encourage potential violators of federal campaign finance laws to come forward, the Commission has adopted a policy providing that "where the available information would otherwise support" a knowing and willful finding, the Commission may "refrain from making a formal finding that a violation was knowing and willful" if the individual makes a *sua sponte* submission and cooperates with the resulting investigation. 72 Fed. Reg. 16,695, 16,696 (Apr. 5, 2007) (hereinafter, "*Sua Sponte* Policy"). Ms. Hughes filed a *sua sponte* report and has been fully cooperative with the government. Further, she satisfies the other factors the Commission weighs when applying the policy, *see id.* at 16,696-97, including ending her involvement in the

⁵ *See, e.g.*, MEPCO_00000114, MEPCO_00000171, MEPCO_00000173, MEPCO_00000175, MEPCO_00000177, MEPCO_00000179, MEPCO_00000181, MEPCO_00000162, MEPCO_00000063, MEPCO_00000065, MEPCO_00000074.

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program once becoming aware it was illegal; her subordinate role to Mr. Laurita; and her lack of personal gain from participating. And she does not meet the aggravating factors outlined in the policy. *See id.* at 16,698. She is not the subject of a criminal or other government investigation and, despite her title, she not actually a "senior official" of Mepco.

The Commission cites MUR 6515 (Professional Fire Fighters of Wisconsin) and MUR 6143 (Galen Capital Corp.) for the position that some *sua sponte* respondents do not receive the benefits of the policy due to aggravating factors. But those cases both involved situations in which the Commission pursued the masterminds of the contribution reimbursement scheme despite their having filed the *sua sponte*, not the subordinate staff who carried out their supervisors' instructions. Ms. Hughes' situation, in contrast, is more similar to that of the respondents in MUR 5357 (Centex), in which the Commission found the submission of a *sua sponte* filing an important factor in entering into conciliation on a non-willful violation.

C. ~~The Commission Should Attempt To Resolve This Matter Through Pre-Probable Cause Conciliation~~

Rather than pursuing a probable cause finding, Ms. Hughes respectfully requests that the Commission engage in pre-probable cause conciliation. Pre-probable cause conciliation is appropriate where further investigation is not necessary, the facts are sufficient to establish a violation of the Act, and it is likely the respondent and Commission can agree on the violation and facts. *See* FEC, *Guidebook for Complainants and Respondents on the FEC Enforcement Process* 14, 16-17 (May 2012); FEC, *OGC Enforcement Manual* 77 (June 2013). Moreover, the Commission's *Sua Sponte* Policy states that the Commission will provide "appropriate consideration" to those who make *sua sponte* filings including, where appropriate, by "offer[ing] conciliation before a finding of probable cause to believe a violation occurred." 72 Fed. Reg. 16,695, 16,696 (Apr. 5, 2007).

All of these factors are present here. Ms. Hughes has cooperated fully in both Mepco's internal investigation of this matter and in the government's investigation. She admitted to her actions *sua sponte* and has been fully forthcoming. Given the extensive document productions that have already taken place, further investigation is not necessary. The facts as admitted in the *sua sponte* filing are sufficient to establish a violation of the Act (but not a knowing and willful one) and Ms. Hughes believes that it is likely that she and the Commission can agree on the violation and facts. Furthermore, continuing the investigation or making a probable cause finding would not encourage cooperation or *sua sponte* reporting by future respondents.

Entering into pre-probable cause conciliation would also be consistent with the Commission's practice in these matters. The Commission regularly enters into pre-probable

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cause conciliation in contribution in the name of another cases, especially with subordinate employees who, like Ms. Hughes, acted at the direction of their employers in making reimbursed political contributions. *See, e.g.*, MUR 5041 (Wuesthoff Memorial Hospital) Conciliation Agreements of Rebecca Colker (Feb. 21, 2001) and Terence Murphy (May 4, 2001); MUR 5305 (Herrera for Congress) Conciliation Agreement of Nadine Giudicessi and James A. Bevan (Sept. 30, 2005); MUR 5453 (Giordano for United States Senate) Conciliation Agreement of William Wittman (Dec. 5, 2005). Even after finding reason to believe that the alleged violation was knowing and willful, the Commission has agreed to pre-probable cause conciliation. *See, e.g.*, MUR 5405 (Hynes for Senate) Conciliation Agreement (Apr. 27, 2005); MUR 5453 (Giordano for United States Senate) Willsey Conciliation Agreement (Oct. 12, 2005); MUR 5366 (Edwards for President/Tab Turner) Turner Conciliation Agreement (June 21, 2006). Accordingly, because Ms. Hughes' case is not materially different from the many other matters in which the Commission has approved pre-probable cause conciliation for employee conduits and because all of the factors the Commission considers when assessing whether to enter into pre-probable cause conciliation are present, pre-probable cause conciliation is appropriate here.

III. Conclusion

As described above, Ms. Hughes did not willfully violate the Act and the Commission has repeatedly refused to impose willfulness penalties against respondents situated similarly to Ms. Hughes. Ms. Hughes respectfully requests to enter pre-probable cause conciliation with the Commission and would be pleased to assist with any requests from the Commission for additional information that might assist it in resolving this matter through pre-probable cause conciliation.

Respectfully Submitted,



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